AMENDED DIRECT TESTIMONY OF

JOHN E. FOLSOM, JR.

ON BEHALF OF

DOMINION ENERGY SOUTH CAROLINA, INC.

DOCKET NO. 2019-184-E

Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS, AND OCCUPATION.

A. My name is John E. ("Eddie") Folsom, Jr. My business address is 6248 Bush River Road, Columbia, South Carolina 29212. As Power Marketing Manager, my responsibilities focus on long-term wholesale business for Dominion Energy South Carolina, Inc. ("DESC" or the "Company").[1]

Q. WHAT IS YOUR EDUCATIONAL BACKGROUND?

A. In 1990, I received a Bachelor of Science degree in Mechanical Engineering from the University of South Carolina.

[1] South Carolina Electric & Gas Company ("SCE&G") changed its name to Dominion Energy South Carolina, Inc. in April 2019, as a result of the acquisition of SCANA Corporation by Dominion Energy, Inc. For consistency, I use "DESC" to refer to the Company both before and after this name change.

Q. WHAT IS YOUR EMPLOYMENT BACKGROUND?

A. In 1989, while still a student, I began working for SCANA Corporation ("SCANA") as an Engineering Student Assistant and have been working for SCANA and DESC ever since. I served in various roles during my career, but since 2000, I have worked in DESC's Power Marketing Department in multiple roles, including Power Marketing Manager and Real Time Trading Operations. In these roles, I primarily represented DESC in the wholesale power market by (i) negotiating power supply agreements for full-requirements customers, (ii) serving as the account manager for such long-term power supply agreements, (iii) negotiating numerous long-term or seasonal Power Purchase Agreements ("PPA") to support DESC's resource adequacy requirements, (iv) negotiating numerous renewable resource PPAs in conjunction with DESC's obligations under the Public Utility Regulatory Policy Act of 1978, 16 U.S.C. §§ 2601, et seq. ("PURPA"), and (v) participating in hourly, daily, and weekly power markets to support reliable and cost-effective optimization of DESC's generation fleet in conjunction with opportunities for short-term wholesale power transactions. Additionally, although I am not an attorney, my responsibilities in the Power Marketing Department require a high degree of familiarity with the Federal Energy Regulatory Commission's ("FERC") regulations, including PURPA, DESC's Open Access Transmission Tariff, the Open Access Transmission Tariffs of other transmission providers, and other regulatory requirements applicable to DESC's operations.

Q. PLEASE FURTHER EXPLAIN YOUR CURRENT ROLE AT DESC AS IT RELATES TO YOUR TESTIMONY AND THE ACT 62 DOCUMENTS YOU HAVE SUBMITTED FOR COMMISSION APPROVAL.

A. I negotiate long-term wholesale power purchases when DESC has a particular need, which is accomplished by soliciting the competitive market for a particular product to match that need. I also negotiate long-term power purchases from Qualifying Facilities (as defined under PURPA) (each, a "QF"). PURPA obligates DESC to purchase power from QFs, and DESC is required to purchase this power without regard for need, location, or the type of generation. Since 2015, although I have not negotiated every PURPA contract on behalf of DESC, I have negotiated more than 26 PURPA-mandated PPAs that were fully executed.

Q. HAVE YOU EVER TESTIFIED BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA (THE "COMMISSION")?

A. I previously submitted testimony in Docket No. 2018-163-E on behalf of DESC regarding certain allegations against DESC raised in a Complaint filed with the Commission by a solar developer. The action was eventually settled and dismissed, without live testimony.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. Act 62 (the "Act") requires jurisdictional electric utilities to establish "standard offer [contracts], avoided cost methodologies, form contract power

purchase agreements, commitment to sell forms" and other such terms and conditions to implement the requirements of § 58-41-20(A). The purpose of my testimony is to address DESC's template form power purchase agreement (the "Form PPA"), standard offer (the "Standard Offer"), and notice of commitment to sell form (the "NOC Form") (collectively, the "Act 62 Documents"), all of which were developed pursuant to the Act.

Q. PLEASE EXPLAIN THE DIFFERENCES BETWEEN PURCHASING POWER IN THE MARKET AND PURCHASING FROM A QF UNDER PURPA.

A. When a QF sells power to DESC, the arrangements are not designed to address a particular need of DESC's customers or DESC's reliability requirements. In the case of small power producers, generally speaking, to qualify as a QF the (i) generator just has to use a renewable fuel source, such as wind, solar, biomass or the like, and (ii) facility must not exceed 80 megawatts AC ("MW-AC"). A QF may sell power to DESC during periods when DESC does not need the power and the QF may be located in places on DESC's system where DESC would not otherwise choose to inject power.

In contrast, when DESC purchases power in the market, it is doing so to address a specific need and it negotiates a product to best fit that need. Indeed, DESC may need a product that offers the flexibility to support the daily morning and evening peak demands of a cold winter day. To fill that need, DESC would

negotiate a product capable of delivering power as early as 5:00 am that can be called upon to run at specific levels for specific hours. For example, the power would be dispatched to meet the morning peak, and then be dispatched to follow load as it decreases during the day and peaks again in the evening. This product offers the flexibility to produce power in response to load trends rather than weather trends.

DESC may also wish to negotiate that the purchase be delivered to a particular interface on its system to promote reliability. Regardless of the particular situation or the exact need, these purchases are designed to meet DESC-specific needs—all of which are focused on providing reliable and efficient power to DESC customers.

Q. PLEASE EXPLAIN WHAT YOU MEAN WHEN YOU SAY A QF MAY INJECT POWER AT POINTS OF INTERCONNECTION WHERE DESC WOULD NOT OTHERWISE CHOOSE TO INJECT POWER.

A. When DESC chooses to self-build or purchase power, regardless of fuel type, it considers its system needs and load needs. However, because of DESC's purchase obligations under PURPA, QFs are able to force DESC to purchase its power without regard for those considerations. For example, if DESC anticipates long-term load growth in a specific part of its system, it may develop generation targeted toward the location of the anticipated load growth. Or, DESC may make a long-

term purchase for which the location of the delivery point to the DESC system may be a consideration in the purchase decision.

DESC's experience has shown that developers typically locate their QF project where land prices are less in order to increase profits derived from the QF's operation—this tends to be in places where load is less and the distribution and transmission system may be less robust. This is less of a concern for the QF once it is operational because it must simply deliver its power from the generator to the point of interconnection. However, it is the utility's obligation to deliver that power on its system to its customers—wherever they are located. This aspect of PURPA makes it difficult for utilities to maximize the benefit of purchased power coming from QFs, as they can with other negotiated or planned resources.

Q. PLEASE PROVIDE A BRIEF DESCRIPTION OF DESC'S EXPERIENCE WITH PURPA.

A. PURPA was passed during the oil embargo and natural gas shortage of the 1970s. PURPA was enacted to promote:

- The conservation of electric energy;
- Increased efficiency in the use of facilities and resources by electric utilities;
- Equitable retail rates for electric consumers;
- Expeditious development of hydroelectric potential at existing small dams; and

- Conservation of natural gas while ensuring that rates to natural gas consumers are equitable.

Among other things, PURPA contains a mandatory purchase obligation, sometimes referred to as the "the PURPA put" or just "put." As implemented pursuant to FERC Order No. 69, utilities are required to purchase power from the QF at rates that do not exceed the utility's avoided cost. This mandatory put can be established through sales made (i) on an as-available basis or (ii) under a long-term agreement, which can take the shape of a (a) long-term power purchase contract, (b) a standard offer agreement which has standardized rates and terms for smaller projects up to 100 kilowatts ("kW"), or (c) binding, non-contractual relationship, or "LEO", as described below.

Initially, DESC received relatively few PURPA projects—the ones it did receive were typically related to an industrial customer wanting to self-build to meet its needs while optimizing the investment by selling excess power to DESC. However, influenced by existence of the Federal tax credits, the passing of Act 236 in 2014, and the downward trends in the cost to construct solar facilities, there has been an explosion in QF development. PURPA has become a mechanism by which developers can develop utility-scale plants where 100 percent of the output can be put to the utility. DESC, like other utilities around the country, has received more inquiries in recent years from QFs interested in developing projects and putting power to DESC. During this time, I have been working with QFs and negotiating these PPAs, and I have witnessed this explosion in growth first-hand. As stated

above, although I have not negotiated every PURPA contract on behalf of DESC, I have negotiated more than 26 PURPA-mandated PPAs just since 2015.

Q. ALTHOUGH PURPA WAS DEVELOPED IN THE 1970s TO ADDRESS, AMONG OTHER THINGS, A NATURAL GAS SHORTAGE, WHAT OPPORTUNITIES DO YOU SEE FOR SOUTH CAROLINA?

A. PURPA was passed at a very different time to respond to very different circumstances. Because of this, PURPA presents some obvious commercial challenges, as explained above. However, an important benefit of PURPA is that it affords state commissions great latitude to implement PURPA in a manner that best suits the particular state. Not only do state PURPA rules vary greatly, but states are also reviewing and revising their rules to address the recent dramatic growth in QF development.

When you consider not only the growth that has occurred to date, but also the expected improvements in renewable generation, it becomes clear that a key concern in this proceeding is the risk of locking-in long-term PPAs that may be less economical as the term progresses because it does not reflect future improvements in technology. As a state, we need to establish rules that adequately protect utility customers and allow the state to benefit from the best products being developed today while allowing for technology advancements of tomorrow.

Q. THE ACT EXPRESSLY ADDRESSES THE NEED TO PROTECT UTILITY CUSTOMERS, CORRECT?

A. Yes. Section 58-41-20(A) is clear in providing, among other things, that "[a]ny decisions by the [C]omission shall be just and reasonable to the ratepayers of the electrical utility, in the public interest, consistent with PURPA and the [FERC's] implementing regulations and orders, and nondiscriminatory to small power producers; and shall strive to reduce the risk placed on the using and consuming public."

Q. BASED ON YOUR EXPERIENCE IN THE WHOLESALE MARKET AND YOUR EXPERIENCE WITH QFs, WHAT ARE THE KEY ISSUES FACING THE GROWING QF INDUSTRY?

A. In this proceeding, the Commission is setting rules that will determine the costs that customers pay for power under PPAs that may be in place for many years to come. It should be noted that there is a limited amount of renewable resources that can be accommodated on our system under current technological and operating characteristics. Utilities and regulators alike can help promote the effective development and deployment of renewable resources by developing rules that allow viable projects to proceed to construction, discourage speculative projects, and provide flexibility to ensure that contracts are prudent for the entire term of the PPA. This not only helps energy developers, it also protects our customers.

The reliability of any forecast decreases with time, especially in an area as technically dynamic as renewable energy. The possibility that future markets will diverge from current avoided cost calculations increases as (i) the term of the PPA lengthens and (ii) the gap in time expands between locking-in rates and actually delivering power. Allowing developers to lock-in rates without having made a substantial commitment to sell the electrical output of their facilities to the utility and providing them with a long lead time to deliver power, shifts risk away from the developers and on to utility customers. As stated above, the Act recognizes the need for balance and appropriately states that "any decision by the [C]ommission shall be just and reasonable to the ratepayers of the electrical utility [and] in the public interest." The Act does not mandate subsidizing the renewable industry, particularly at the expense of ratepayers. As stated above, this is a rapidly changing industry where technology is improving and generation products are evolving. The forms, methodologies, and rules we adopt today should prevent the system from becoming flooded with QFs as a result of rules that shift an inordinate amount of risk from QFs to ratepayers. Instead, the ratepayers of South Carolina should be in a position to benefit as advances continue to take shape in this industry. The Act appears to recognize these changes in calling for the development of rules and processes that allow ratepayers to benefit today and over time from future industry improvements.

Q. HAVE YOU INCLUDED DESC'S FORM PPA WITH YOUR TESTIMONY?

A. Yes. It is attached to my testimony as Exhibit No. __ (JEF-1).

Q. IS THIS FORM PPA LARGELY IN THE SAME FORM AND SUBSTANCE AS THE PPA DESC HAS BEEN USING TO PURCHASE POWER FROM QFs?

A. Yes. DESC believes that keeping its Form PPA largely consistent with the existing form makes sense from a business perspective because many in the renewable industry have either (i) executed a contract very similar to the Form PPA or (ii) become familiar with at least some iteration of this general form of PPA over the last several years. It also makes sense from a regulatory perspective because these executed PPAs have all been filed with and accepted by the Commission. In short, the adoption of a Form PPA that closely follows the existing form makes sense because the existing form has been executed by solar developers, reviewed by the Commission, and satisfied project finance requirements. These points are substantiated by the large volume of solar under contract today.

Q. PLEASE EXPLAIN THE PRINCIPLE MODIFICATIONS MADE TO THE FORM PPA.

A. Generally, the modifications were intended to tailor the Form PPA to the requirements of the Act. The following provides a listing of the principle modifications:

- General Applicability to Eligible Renewable Resources.

The Form PPA is no longer specific to any one type of renewable fuel source. Rather, it is designed to accommodate any eligible renewable source, subject to some additional project-specific details.

- The Development Period Credit Support.

This is a form of security posted by the QF to secure its obligations prior to commercial operation. Assuming the QF performs under the Form PPA, this security will not be called upon. This type of provision is common in a variety of commercial agreements, including PPAs, and ultimately provides security to the utility customers. Based on DESC's experience, the amount of the Development Period Credit Support (as defined in the Form PPA), addressed in Section 9.3, was modified to $41.00/kW-AC.

- Excusable Delays.

Excusable Delays (as defined in the Form PPA) generally represent delays in the ability of a QF to begin delivery of power to DESC due to (i) Force Majeure (as defined in the Form PPA), (ii) a delay caused by DESC, or (ii) delays in the completion of the Interconnection Facilities unless such delay was directly or indirectly caused by the QF. The PPAs that DESC and QFs have been executing included limits on these delays. If these limits are exceeded, the QF would have to pay to extend the deadline in order to maintain a viable PPA. These limits properly reflect the risk assumed by the QF and are appropriate with a longer 24-month development period.

In the Form PPA, the initial anticipated lead time for the project is based on a 12-month period, as specified in Section 4.2 of the Form PPA. Based on DESC's experience, limiting the development period to 12 months after rates have been set provides better protection for ratepayers from changes that impact the avoided cost calculation. As a compromise to QF developers, in concert with the shorter defined lead time, the limit on allowable Excusable Delays for reasons other than Force Majeure was removed. Providing a shorter development period, while giving QFs more protection for Excusable Delays, is a reasonable compromise that protects legitimate interests of the ratepayer and the QF.

- Curtailment.

As allowed under PURPA, DESC and QFs typically negotiated curtailment provisions that provide for the curtailment of power without payment during emergency conditions, events of Force Majeure, and other defined circumstances. The Form PPA (Section 5.1(f)) limits such curtailments to Emergency Conditions and events of Force Majeure.

- Environmental Attributes and Renewable Energy Certificates ("RECs").

Previously, the existing PPA addressed RECs and typically provided for a right of first offer. However, the negotiation of RECs is outside the scope of PURPA. RECs are therefore no longer addressed in the Form PPA. Any issues related to RECs will be addressed separately from the Form PPA on a case-by-case basis.

- Variable Integration Costs or Variable Integration Charge ("VIC").

DESC previously maintained a provision (Section 5.2(b)) in its PPA that allowed for a VIC to be implemented. However, at this time, the Form PPA does not include a VIC or other similar integration provisions. The rationale for not including the VIC is explained in detail in this docket by DESC Witnesses Bell and Tanner. To briefly summarize their explanations, the uncertainty created by the addition of variable solar generation to DESC's system has resulted in DESC maintaining higher operating reserves. These higher operating reserves and associated costs are now part of DESC's normal dispatch. As such, they are more appropriately addressed in the avoided cost methodology because they represent a "cost incurred" by the utility as a result of the mandatory purchase(s). Since this incurred cost is addressed in the avoided cost methodology, the VIC was removed from the Form PPA.

- Confidentiality.

In recent years, DESC typically filed fully executed QF PPAs with the Commission in unredacted form. These PPAs generally utilized DESC's RATE PR-2 tariff to define the avoided cost rates paid to the QF(s). However, future executed Form PPAs will be filed in redacted form to protect certain market sensitive information, including, but not limited to, avoided cost rates specific to the PPA and other similar project-specific, confidential information. To accomplish this, Section 15.17 of the Form PPA was revised to reflect the protection of confidential or market sensitive information.

- Choice of Venue.

Section 58-41-20(A) of the Act specifically requires power purchase agreements to address choice of venue. Section 15.24 of the Form PPA addresses this requirement and specifies that venue shall be Columbia, South Carolina for disputes (state or federal) arising under the Form PPA.

Q. PLEASE EXPLAIN HOW THE VIC PROVISION AGREED TO IN EXISTING PPAs WILL BE ADMINISTERED.

A. There are fully executed PPAs, totaling approximately 700 MW-AC, where system costs associated with variable resources are not reflected in the avoided cost rates. However, DESC negotiated a VIC provision as the means for DESC to capture its costs incurred as a result of the variable nature of these resources. The negotiated VIC language for these specific PPAs clearly specifies in Section 5.2(b) thereof that the QF will be responsible for additional costs associated with integrating their projects. This mechanism prevented the QF from being subjected to a charge until it could be more reasonably quantified and also served to protect ratepayers from paying costs that are attributable to and properly borne by the QF. As described more fully below, DESC is able to quantify the charge and will collect the VIC on a prospective basis.

Q. HOW DOES DESC PROPOSE TO RECOVER THESE NEWLY QUANTIFIED INTEGRATION COSTS FOR THE EXECUTED PROJECTS DISCUSSED IMMEDIATELY ABOVE?

A. With the calculation of these costs complete and fully represented in Company Witness Dr. Matthew Tanner's testimony. DESC intends to apply the VIC to those QFs with variable integration costs language in their PPAs. This recovery will be assessed as a monthly charge against the avoided cost rate that will ultimately depend upon the QF's actual megawatt-hour ("MWh") or kilowatt-hour ("kWh") production. This charge will be administered in the billing month corresponding to the effective date of the Commission's Order authorizing DESC to collect the VIC, including the true-up. For these PPAs, the VIC is $4.14/MWh as calculated by Company Witness Dr. Matthew Tanner. Once set, this rate will not change for an existing PPA, whether the solar generator is already interconnected or still awaiting completion of construction, and will continue until the term of the PPA expires.

Q. PLEASE EXPLAIN WHAT THE ACT DESCRIBES AS THE "STANDARD OFFER."

A. Section 58-41-10 of the Act states that the "'Standard offer' means the avoided cost rates, power purchase agreement, and terms and conditions approved by the [C]ommission and applicable to purchases of energy and capacity by electrical utilities [from QFs up to 2 MW-AC]." Alternatively stated, the Standard

Offer is a PPA that includes price, terms, and conditions, and is not negotiated. The concern was that for smaller projects, the costs of negotiating and administering the contract could render the project non-viable.

Q. DOES THE ACT EXPAND THE REQUIREMENTS OF PURPA RELATIVE TO THE STANDARD OFFER?

A. Yes. As described above, PURPA requires utilities to have in place standard rates for QFs up to 100 kW-AC. However, the Act increases the threshold for standardized rates, terms, and conditions from 100 kW-AC to 2 MW-AC in size.

Q. BASED ON YOUR EXPERIENCE, DOES A PPA FOR 2 MW-AC REQUIRE TERMS AND CONDITIONS DIFFERENT THAN A PPA LIMITED TO 100 kW-AC?

A. Yes. A PPA for a utility-scale project, like a 2 MW-AC project, is larger in scope and requires additional ratepayer protections. To put this in perspective, DESC would typically spend substantial time and resources in negotiating the details of a 2 MW-AC project because these projects are more complex to design and develop, they provide more power which the utility must plan for, and may have a broader range of impacts on the DESC system. However, the same is not necessarily the case for projects of 100 kW-AC.

DESC's challenge in drafting its Standard Offer is ensuring that a single document is effective in (i) governing the relationship of DESC and a QF (up to 2

MW-AC) and (ii) appropriately protecting ratepayers. This need is further compounded by the fact that the Standard Offer is a unilaterally executed PPA, complete with pricing, terms, and conditions, and available for all eligible QFs up to 2 MW-AC.

Q. IS THE STANDARD OFFER THEREFORE SIMILAR TO THE FORM PPA?

A. Yes. The Standard Offer, which is attached to my testimony as Exhibit No. __ (JEF-2), is very similar to the Form PPA. Both are largely based upon the form of PPA that DESC has been using for similar utility-scaled projects. As stated above, because the Standard Offer now applies up to 2 MW-AC, it is important to include similar commercial terms and protections for DESC's customers.

Q. DOES THE STANDARD OFFER ADDRESS A VIC?

A. No. Like the Form PPA, and for the reasons the VIC was removed from the Form PPA, the Standard Offer does not presently address a VIC or other similar integration provisions.

Q. DOES THE STANDARD OFFER CONTAIN A "SELLER BUY DOWN" PROVISION LIKE THE FORM PPA?

A. No. Although it could be argued that such a provision should be included for projects that qualify for the Standard Offer, DESC is comfortable not including this provision given the other customer protections included in the Standard Offer.

Q. WILL FULLY EXECUTED PPAs UNDER THE STANDARD OFFER BE FILED WITH THE COMMISSION IN REDACTED FORM AS DESCRIBED FOR THE FORM PPA?

A No. DESC is comfortable that the Standard Offer does not risk disclosing confidential or market sensitive information. Section 15.17, therefore, includes the mutual acknowledgement of the QF and DESC that such Standard Offers will be filed with the Commission in unredacted form.

Q. IS IT POSSIBLE THAT DEVELOPERS CAN TAKE ADVANTAGE OF THE STANDARD OFFER AND FLOOD DESC WITH PROJECTS NO LARGER THAN 2 MW-AC?

A. Yes, quite possible. As I stated, it is as if DESC has already signed a contract, complete with pricing and terms, and is offering that contract to any developer (local, regional, national, or international) with an eligible project. Although the projects eligible for the Standard Offer may be small as compared to other individual

projects, the total aggregate MW-AC of power purchased by DESC under Standard Offer could be very significant.

Q. COULD A DEVELOPER SPLIT A PROJECT INTO MULTIPLE SMALLER PROJECTS TO TAKE ADVANTAGE OF THE STANDARD OFFER?

A. That is a real concern. However, the Standard Offer, as proposed, is not available to a QF owned by a seller or an affiliate or partner of a seller, who sells power to DESC from another QF, using a renewable energy resource within one mile of each other, unless the aggregate capacity of the QFs is equal to or less than 2 MW-AC. The provision, located in the introduction and Section 13.2(e), is modeled after PURPA's "one-mile rule," and stipulates that if two facilities (i) are located within one (1) mile of each other, (ii) are QFs under PURPA, and (iii) have common ownership at any time after they request to interconnect and continuing through commercial operation—specifically including executing the Standard Offer—then, the generating capacity of the two QFs (proposed or otherwise) will be added together for purposes of determining eligibility for the Standard Offer.

Q. ARE YOU FAMILIAR WITH THE TERM "LEGALLY ENFORCEABLE OBLIGATION," AS CONTEMPLATED BY PURPA?

A. Yes. As discussed above, QFs enjoy multiple avenues under PURPA to trigger the utility's "must purchase" obligation. One such option is to establish a

non-contractual, but binding, legally enforceable obligation (a "LEO")[2] rather than negotiating a PPA. QFs are entitled to receive the utility's avoided cost rates calculated at the time the LEO is established. The purpose of the LEO concept is to provide a QF with the ability to proceed forward with development when a utility refuses to negotiate a PPA. For example, if a QF is ready, willing, and able, i.e., substantially committed, to deliver power to the utility, but the utility simply refuses to negotiate a PPA, PURPA provides this non-contractual LEO framework.

Q. DOES THE ACT CONTAIN A PROVISION COMPARABLE TO PURPA'S LEO WHICH ALLOWS A QF, THAT IS SUBSTANTIALLY COMMITTED TO PRODUCING AND DELIVERING POWER, TO UNILATERALLY LOCK-IN A PRICE AND CERTAIN TERMS?

A. Yes. Section 58-41-20 mandates that a QF "shall have the right to sell the output of its facility to the electrical utility at the avoided cost rates and pursuant to the power purchase agreement then in effect by delivering an executed [NOC Form]." It is important to point out that PURPA does not require the NOC Form. The NOC Form is purely a creature of the Act.

As discussed, the LEO concept under PURPA was meant to guard against the possibility of utilities refusing to enter into PPAs with QFs, thereby not providing them with access to the marketplace. In contrast, a QF can submit the

[2] *See* 18 C.F.R. 292.304(d).

NOC Form without ever attempting to negotiate any PPA with DESC. However, as discussed in greater detail below, common to both the LEO concept and the NOC form is that the QF must make a substantial commitment to sell the electrical output of its facility to the utility in order to establish this non-contractual, yet binding, commitment.[3]

Q. IS THE NOC FORM PROVIDED WITH YOUR TESTIMONY?

A. Yes. It is attached to my testimony as Exhibit No. __ (JEF-3).

Q. DOES THE NOC FORM PROPOSED BY DESC REFLECT CONCEPTS EITHER EXPRESSLY APPROVED BY OR USED IN OTHER JURISDICTIONS?

A. The NOC Form draws largely upon LEO concepts in place in other states, as well as DESC's institutional knowledge accumulated from experience in this arena. Although the FERC provided the framework for the LEO concept, states have wide discretion in determining the specifics of how and when a QF can create a LEO. Even with this wide discretion, state LEO standards time and again echo the same underlying principle—the QF must make a substantial commitment to sell the

[3] *See, e.g., JD Wind 1, LLC*, 129 FERC ¶ 61,148 (2009) ("Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.")

electrical output of its facility to the utility in order to establish a LEO.[4] By way of example, Idaho requires "a firm, binding, and unconditional offer"[5] from the QF to create a LEO.

Q. PLEASE PROVIDE A BRIEF SUMMARY OF THE CONTENTS OF THE NOC FORM.

A. The NOC Form is built around the foundational principle that the QF must make a substantial commitment to delivering the electrical output of its facility before it can establish the type of non-contractual, yet binding, relationship contemplated by the NOC Form. The NOC Form touches upon issues such as site control, delivery periods, and delivery deadlines as these provisions evidence substantial commitment and are important to prevent a developer from gaming the system by locking-in rates for a speculative project. This sort of gaming is detrimental to ratepayers and the solar industry as a whole. These provisions are briefly summarized below:

[4] *See, e.g., Whitehall Wind, LLC v. Mont. Pub. Serv. Comm'n*, 347 P.3d 1273, 1276 (Mont. 2015) ("[T]he Commission examined the 'totality of the circumstances to determine if the [qualifying facility] has made an **unconditional commitment** to deliver energy, capacity[,] or energy and capacity.'") (alteration in original) (citation omitted) (emphasis added); *Re: Long Island Lighting Co.*, 1993 WL 564914 (N.Y.P.S.C. 1993) ("[A LEO] is met when a developer has done everything in its power to obtain a contract, by describing a fully-designed facility to a utility, proffering a complete contract for that facility to that utility which comports with **existing policy**, and negotiating all issues on which there is no existing policy either to the point of agreement or to the point of impasse.") (emphasis added).

[5] *In the Matter of Idaho Power Company's Petition to Modify Terms & Conditions of Purpa Purchase Agreements in the Matter of Avista Corps., et al.*, No. 33419, 2015 WL 6958997, at *14 (Nov. 5, 2015).

➢ Delivery Date.

The NOC Form requires the QF to certify how long it will be able to deliver power to DESC. DESC believes that a QF can hardly be characterized as having made a substantial commitment to sell the electrical output of its facility if it is still over a year away from being able to actually deliver that power. Therefore, the NOC Form requires the QF to certify that it will be able to commence delivery of such power within 365 days of the submittal of the NOC Form to DESC.

Experience informs us all that avoided cost rates are subject to fluctuation. The greater the time period from the date the QF is able to lock-in rates to the date upon which it begins to deliver power, the greater the possibility that avoided costs have changed—whether via an increase or decrease. There is likely no way to fully eliminate this risk, but requiring power to be delivered within 365 days of establishing the LEO certainly helps mitigate the potential impact from material fluctuations in avoided cost rates.

As I noted above, the NOC Form draws upon the guidance of other states' LEO standards, and this provision is no different. Idaho maintains a similar requirement by which a QF must be able to deliver power within 365 days in order to establish a LEO.[6] Given that Idaho maintains such a requirement, and a much more stringent requirement (90-day delivery window) was upheld in Texas,[7] DESC

[6] *See In the Matter of the Application of Avista Corp. for Approval of Proposed Revisions to Schedule 62.*, No. 33048, 2014 WL 2507457, at *4 (May 30, 2014).

[7] *See Power Res. Grp., Inc. v. Pub. Util. Comm'n of Texas*, 422 F.3d 231 (5th Cir. 2005).

believes that this requirement is well in-line with not only other states, but also the intent of PURPA, by ensuring that an appropriate balance exists between encouraging QF development while protecting the utility and its ratepayers.

- Delivery Term.

Given that DESC will rely upon the NOC Form to plan for and serve its customers, the NOC Form requires the QF to specify the term of delivery, which must be at least ten years, or such lesser period that may be mutually agreed in a PPA executed by the QF and DESC. Again, a QF that is unable to specify a delivery term would be hard-pressed to convince DESC and this Commission that it has made a level of commitment sufficient and substantial enough to establish a LEO.

- Project Site Control and Applicable Permissions.

The NOC Form requires the QF to certify that it has secured the site for at least the length of the specified delivery period and has obtained all land use and environmental permits necessary to operate and construct the facility. DESC views this as a critical indicator of the substantial commitment required to establish this binding relationship. Indeed, other states have recognized these elements as critical pieces of the substantial commitment formula described above and have implemented similar "control-and-approval" concepts in their LEO framework.[8]

- Non-refundable Fee.

[8] *See* Mont. Admin. R. 38.5.1909; *In the Matter of A Complaint by Red Lake Falls Cmty. Hybrid LLC Regarding Potential Purchased Power Agreement Terms & Pricing with Otter Tail Power Co.*, E-017/CG-16-1021, 2018 WL 2684390 (May 31, 2018).

DESC is requiring a non-refundable fee in the amount of $5,000.00 for each NOC Form submitted. This fee is intended to cover a portion of the administrative costs associated with the NOC Form that DESC would otherwise be unable to recover.

Q. WHAT IF THE QF IS ABLE TO DELIVER POWER WITHIN 365 DAYS, BUT DESC IS UNABLE TO ACCEPT THAT POWER WITHIN THAT TIMEFRAME?

A. The NOC Form contemplates this exact scenario in Section 8(iii). If DESC does not have interconnection facilities that are sufficient to accept the QF's power, DESC will notify the QF at least 30 days prior to the expiration of that 365-day deadline. In that notification, DESC will explain what additional facilities are needed to establish the interconnection, and the QF will not be penalized as a result of inadequate interconnection facilities.

Actually, this is not the only place in the NOC Form where the QF is assured that it won't be disadvantaged based upon actions that are not entirely its own. Section 58-41-20(D) requires that the QF be afforded a "reasonable period of time from its submittal of the [NOC Form] to execute a power purchase agreement." However, the same section also mandates that a QF cannot be required to execute [such] PPA "prior to receipt of a final interconnection agreement from the electrical utility." In accordance with the Act, the NOC Form provides the QF with 90 days to execute such PPA. However, the QF will have additional time in which to execute the PPA if DESC has not provided the QF with a final interconnection

agreement prior to such deadline. These provisions are commercially reasonable and in compliance with the Act.

Q. COULD A DEVELOPER EXECUTE THE NOC FORM BUT THEN SEEK TO TAKE ADVANTAGE OF RISING AVOIDED COST RATES?

A. Yes. If the avoided cost rates increase after establishment of the LEO and the QF has not executed a PPA, the QF could walk away from its LEO in an attempt to enjoy the higher avoided cost rates. It would shift risk from the QF onto the utility's customers if this was allowed unchecked and the utility's customers would bear the burden of an inflated avoided cost rate. To address this, DESC included Section 9 to prevent a QF from gaming rate fluctuations. Section 9 states that if the NOC Form terminates either because the QF does not execute a PPA within the time period or the QF does not commence delivery of power within 365 days, then the QF, its affiliates or any successor, shall only be offered an as-available rate for this particular facility for a period of two years following termination of the NOC Form.

Q. HOW DOES THE "MAKE-WHOLE" PROVISION IN SECTION 10 RELATE TO THE SUBSTANTIAL COMMITMENT REQUIRED IN ORDER TO ESTABLISH A LEO?

A. As stated previously, given the unilateral nature of the NOC Form and the various certifications therein, including that the QF will be able to deliver power within 365 days, DESC must be able to rely on the NOC Form in forecasting to

serve its load. Therefore, DESC must proceed as if each NOC Form is true and correct in all respects.

Even with this assurance, this means that a subset of NOC Forms will be submitted to DESC requiring it to expend time and resources on a project that will never deliver power. It is easy to imagine how these costs may accumulate when the losses incurred from non-viable QFs are aggregated.

In trying to strike a balance on this point, DESC looked to FERC precedent[9] on designating network resources. The FERC requires a certain firmness in these types of resources because they are used to serve network load—that is, a PPA must be sufficiently firm to ensure the purchaser can rely on receiving the contracted-for power. The FERC has sanctioned the use of a "make-whole" provision to ensure the requisite degree of firmness.

Similarly, in order to protect DESC's customers, the NOC Form similarly contains a make-whole provision. This is a commercially reasonable provision and is necessary to "reduce the risk placed on the using and consuming public."

Q. PLEASE EXPLAIN THE ATTESTATION CLAUSE IN THE NOC FORM.

A. The attestation clause requires someone "with personal knowledge" of the matters in the NOC Form to review it and certify to the various items contained therein—including that DESC can rely on the NOC Form for its "resource needs

[9] *See* FERC Order No. 890.

and resource planning purposes." The attestation clause is the final step to verifying that the QF has indeed made the substantial commitment.

Again, DESC borrowed this provision from FERC precedent dealing with network resources. The FERC has sanctioned the use of the attestation clause in the context of designating network resources. Consistent with FERC precedent, the utilities should not have the burden of verifying the accuracy and veracity of the contents of the NOC Form. Instead, the QF is in the best position to certify to the accuracy and completeness of these statements.

Q. PLEASE SUMMARIZE FOR THE COMMISSION WHAT DESC IS REQUESTING IN THIS PROCEEDING AS IT RELATES TO YOUR TESTIMONY.

A. DESC respectfully requests that the Commission approve, as submitted, the:

- Form PPA;
- Standard Offer; and
- NOC Form.

These submittals are consistent with the requirements of the Act, provide necessary ratepayer protections, and offer commercially reasonable terms to QFs.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.